Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

ARTHUR CUTSHALL,

Petitioner,

v.

DON SUNDQUIST, Governor of the State of Tennessee,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Tennessee Sexual Offender Registration and Monitoring Act (the "Act") constitute an intentional punishment that, when applied retroactively to Petitioner, violates the Ex Post Facto Clause or Double Jeopardy Clause of the U.S. Constitution? Alternatively, does the Act violate Petitioner's due process rights?

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 193 F.3d 466 (6th Cir. 1999). A copy of this opinion is included in the Appendix at Appendix A. The order and memorandum issued by the District Court for the Middle District of Tennessee on the parties' cross-motions for summary judgment are reported at 980 F. Supp. 928 (M.D. Tenn. 1997). Copies of this order and memorandum are included in the Appendix at Appendix B. Copies of the order and memorandum issued by the District Court for the Middle District of Tennessee on Petitioner's motion for preliminary injunction are included in the Appendix at Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on October 4, 1999. On October 18, 1999, Petitioner filed a petition for rehearing with the Court of Appeals and a motion for leave to file petition out-of-time. The Court of Appeals allowed the petition for rehearing to be filed but, on November 19, 1999, denied the petition for rehearing. A copy of the order of the Sixth Circuit denying Petitioner's petition for rehearing is included in the Appendix at Appendix D. This Petition for Writ of Certiorari is filed within 90 days of the entry of the Court of Appeals' opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I, § 8, cl. 1
Ex Post Facto Clause

No State shall . . . pass any ex post facto Law . . .

U.S. Const., art. IV, § 2, cl. 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const., amend. V,
Double Jeopardy Clause

No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .

U.S. Const., amend. XIV, § 1
Due Process Clause

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Sexual Offender Registration
and Monitoring Act
Tenn. Code Ann. §§ 40-39-101 to -108

The Act, as codified in 1995, is contained in the Appendix at Appendix E at 75a-86a.

STATEMENT OF THE CASE

In 1994, the Tennessee state legislature passed the Sexual Offender Registration and Monitoring Act ("the Act"), which took effect on January 1, 1995 but which applied retroactively to persons convicted of sexual offenses prior to the effective date. (R. 22, Def.'s Add. at 1; J.A.1, at 48.) The Act as

originally passed by the Tennessee legislature did not contain a statement of purpose or intent. (R. 22, Def.'s Add. at 1-7; J.A.1, at 48-54; *see* App. E at 75a-86a.) The legislative history of the Act, however, contains clear expressions of legislative intent.

Representative Brenda Turner, who introduced the bill in the House, stated that the Act was intended to "aid the citizen's self-protection, assist in law enforcement investigations and provide a deterrence for offenders. . . ." (R. 22, at 30; J.A.1, at 78.) Representative Turner further summarized the intent of the Act as follows:

> The intent of legislation establishing sex offender registry is generally fourfold. Provide a tool for law enforcement officials to use in the investigations. Aid in citizen self protection. Serve as a deterrent effect on offenders by ending their anonymity in the community, and provide legal grounds for holding known offenders in suspicious circumstances.

(R. 22, at 30; J.A.1, at 78; *see also* R. 22, at 32; J.A.1, at 80.)

The Senate sponsor of the bill, Senator Crow, repeatedly stated that the Act was intended to deter convicted sex offenders from traveling to Tennessee and encourage convicted sex offenders to leave Tennessee. (R. 22, at 35, 42, 49, 55, 57; J.A.1, at 83, 90, 97, 103, 105.) Senator Crow believed that with passage of the Act "we'll see sex offenders leaving Tennessee and you won't see them coming in." (R. 22, at 35; J.A.1, at 83.)

The state legislators repeatedly indicated that the Act was intended to deter sexual offenses and make it easier to re-incarcerate them if deterrence fails. For instance, Representative Turner also stated:

> And this is the procedure to establish and make a statement to the state of Tennessee that we do not want these people, these pedophiles and repeat offenders to continue to repeat this offense in the state of Tennessee without answering the call, losing their probation, losing their parole, being reincarcerated and recharged, unfortunately after another offense, or sometimes preventing the offense from occurring again.

(R. 22, at 47; J.A.1, at 95.) And Senator Rochelle stated that the Act provided "an opportunity to take a large step to prevent reoccurrence of sexual offenses. . . ." (*Id.*) In short, the legislative history contains numerous indications that deterrence of crime and deterrence of travel to and residence in this state by sexual offenders — by imposition of heavy registration and monitoring burdens, the threatened and actual release to the public of Sex Offender Registry information, and the threat of criminal sanctions for violations of the Act — were primary goals of the Act.

The Act imposes considerable registration and monitoring requirements on convicted sexual offenders who have been released from custody, regardless of type of offense.[1] (R. 22, Def.'s Add. at 2; J.A.1, at 49.) The Act requires offenders to place themselves on the Sex Offender Registry within ten days of their release and to respond to quarterly requests for information updates within ten days of the receipt of such requests. (R. 22, Def.'s Add. at 3-4; J.A.1, 50-51.) The information that must be provided by registrants includes name, aliases, driver's license

1. The Act covers a wide array of sexual offenses, from statutory rape and solicitation to incest and aggravated rape. (R. 22, Def.'s Add. at 2-3; J.A.1, at 49-50.) Unlike some other states' versions of "Megan's Law," Tennessee's version does not differentiate between types of offenses nor between levels of risk but rather applies all provisions of the Act to all types of the targeted offenses.

information, Social Security Number, race and gender, home address and length of residence, and name and address of current employer and length of employment, and may include a current photograph. (R. 22, Def.'s Add. at 4, 19, 24-25; J.A.1, at 51, 67, 72-73; Tenn. Code Ann. § 40-39-103 (1999 Supp.).) In addition, registrants must notify the Tennessee Bureau of Investigation ("the TBI") every time Sex Offender Registry information changes (even temporarily, which is defined to be a period longer than ten days), and registrants are subject to random checks by the TBI at any time to verify information submitted. (R. 22, at 19, 23, 27; J.A.1, at 67, 71, 75.) In addition to the TBI's quarterly updates and constant threat of random verification checks, the TBI is required to issue press releases, public service announcements, and engage in other public information activities "to ensure that all sexual offenders are informed and periodically reminded of the registration and verification requirements *and sanctions* of this chapter." (R. 22, Def.'s Add. at 5; J.A.1, at 52 (emphasis added); *see also* Tenn. Code Ann. § 40-39-105(e) (1997).)

According to the TBI's Standard Operating Procedures for the Act, the TBI is to distribute a list of registrants (including residence and employer addresses and other identifying information) to each registrant's local police, sheriff, and district attorney at least quarterly. (R. 22, at 16; J.A.1, at 64.) The TBI is also to report to the local district attorneys any registrants in violation status under the Act and is to request that charges be brought against such offenders (*id.*), and request that such offenders be investigated and apprehended by the local police. (R. 22, at 5; J.A.1, at 52.)

Failure to register under the Act or otherwise comply with the terms of the Act constitutes a misdemeanor for the first violation and constitutes grounds for revocation of parole or probation. (R. 22, at 6-7, 20; J.A.1, at 53-54, 68.) Subsequent violations of the Act are felonies. (*Id.*) According

to an amendment that took effect July 1, 1996, the TBI may present evidence of alleged violations by affidavit in prosecutions for violations of the Act. (R. 36, Def.'s 2d Add. at 281; J.A.2, at 376.)

The Act imposes potentially lifelong requirements and restrictions on all targeted offenders. (R. 22, Def.'s Add. at 6; J.A.1, at 53.) Ten years after release, the Act allows a registrant to petition the local circuit court for removal from the Sex Offender Registry, but a registrant may be removed from the Registry only if the court finds that (a) the registrant has complied with the Act, (b) is rehabilitated, and (c) poses no threat to society; absent such findings, registrants remain subject to the Act's requirements until their death. (R. 22, Def.'s Add. at 6, 20, 27; J.A.1, at 53, 68, 75.) Therefore, every offender falling under the Act's broad scope is automatically subject to a minimum ten-year term of continual registration and monitoring that can be removed only if a very high threshold is met, regardless of the nature and severity of the crime, regardless of past offense history, regardless of amount of time served and conduct while in custody, and regardless of condition on release.

Under the Act, information contained in the Sex Offender Registry may be provided to the general public whenever the TBI or local law enforcement officials deem the release of such information "necessary to protect the public" or "in the interest of public safety." (R. 22, Def.'s Add. at 5, 21; J.A.1, at 52, 69.) No further guidance is given to law enforcement officials as to when the release of registrant information is proper, and law enforcement officers are immune from liability for the release of Registry information when done in good faith. (R. 22, Def.'s Add. at 5-6, 17-22; J.A.1, at 52-53, 65-70.) As the District Court first hearing this case noted, "[n]o guidelines or procedures exist to rein in this broad power held by law enforcement." (R. 56, Mem. of Ct. at 3; J.A.2, at 564; App. B at 46a-47a.) Nor is any

provision made for any record-keeping of to whom information is released. Also, the Act does not require that a registrant be given any notice before or after a public disclosure of Registry information by law enforcement, nor is a registrant given any administrative or judicial right to protest the release of Registry information at any time. (R. 22, Def.'s Add. at 1-7, 17-22, 26-27; J.A.1, at 48-54, 65-70, 74-75.)

The public notification provisions of the Act significantly alter both the amount of offender information available to the public and the procedure for the release of information. Prior to the Act, almost all information about paroled offenders was confidential. Pursuant to Tenn. Code Ann. § 40-28-119(c), the Board of Parole is given authority to make rules regarding the privacy and release of parolee records. Pursuant to this rule-making authority, the Board of Parole issued Administrative Rule 1100-1-1-.14 (App. E at 91a-95a), which provides that virtually all of the information that is on the Registry would otherwise be confidential. Indeed, all personal parolee information held by the Parole Board is confidential and may not be released to the public, except for Social Security numbers that may be released to employers, and may be released to law enforcement officials only to aid in investigations. *See* Tenn. Admin. Rule 1100-1-1-.14 (1995); App. E at 91a-95a. Therefore, the Board of Parole does not release any of the information contained in the Registry to the general public.

Furthermore, information in the Sex Offender Registry would not necessarily otherwise be in the State's records. The Tennessee Department of Corrections is not mandated to record Social Security numbers, driver's licence numbers, aliases, employment locations, lengths of employment, or lengths of residence at various locations, nor to maintain current inmate photographs.[2] *See* Tenn. Code Ann. § 4-6-140(a); App. E

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2. As discussed above, pursuant to statutory authority, the Parole Board has designated virtually all of the information in the (Cont'd)

at 67a. Furthermore, neither the Corrections Department nor the Parole Board possesses, once custody and supervision have ended, current home and work address information or current photographs, and neither agency would know if a person had changed his or her name or had begun using an alias (as the person could legally do), because, of course, the records of the Department of Corrections and the Board of Parole are not updated after an individual is no longer under their supervision. Thus, information in these agencies' files may be incorrect and thus of little significance to the ex-convicts or parolees. It is only through the constant monitoring of registrants by the TBI and local officials that the State of Tennessee remains aware of the registrants' whereabouts and appearance.

Furthermore, the Act removes the greater protections that previously existed regarding the release of offender information to the public. Information is disclosed by the Department of Corrections only on written request stating why the information is requested, and individual correctional institutions are not allowed to disclose information; thus, a record of the persons requesting information exists, the Department has the right to review and decline requests, and the public must come to the Department rather than the Department initiating disclosures. *See* Tenn. Admin. Rule 0420-1-2-.01 to -.06 (1989); App. E at 87a-91a. Moreover, a charge of $10.00 plus 20 cents per copy requested must be paid to the Department of Corrections. *Id.* As an added protection for parolee records, the Parole Board

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(Cont'd)
Sex Offender Registry to otherwise be confidential after supervision of a sexual offender ends. *See* Admin. Rule 1100-1-1-.14 (1995); App. E at 91a-95a. The Correction Department's rules specifically provide that information made confidential by law will not be released. Tenn. Admin. Rule 0420-1-2-.01 (1989); App. E at 87a. Thus, the Parole Board's rules may supersede the Correction Department's rules if a parole occurs.

retains authority to determine whether a release of requested information would endanger a parolee or others and, if so, to decline the request. Tenn. Admin. Rule 1100-1-1-.14(1)(a)(10) (1995); App. E at 92a.

With passage of the Act, the police may now, on their own initiative and without any request by the public, disclose a registrant's aliases, current home address and telephone number, current work address and telephone number, length of time at a given residence and job, and Social Security number to anyone and not simply employers, and may distribute current photographs. Such information was not subject to voluntary disclosure to the public before passage of the Act.

Once information has been released, members of the public may do with the information as they wish because the Act places no constraints on the public's use of Registry information. They may, for instance, place the information on the Internet, in ads in local newspapers, on billboards, or publish the information through any other medium. The public may very well use the information to locate offenders and their families so that they can attack them, harass them, or otherwise seek to drive them from the community, as has happened on several occasions. *See Doe v. Pataki*, 940 F. Supp. 603, 608-11 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997) (detailing numerous incidents of vigilantism, at times on persons of mistaken identity, after the public was notified of offenders in their localities); *see also* James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 Yale L.J. 1055, 1088 n.151 and accompanying text (1998). The Act places no constraints on how members of the public may use the Registry information given to them and provides for no sanctions in the case of misuse of Registry information.

In January, 1990, before passage of the Act, Petitioner entered a guilty plea to aggravated sexual battery and received a sentence of twelve years incarceration. (R. 18, 1st Am. Compl. at 1-2; J.A.1, at 37-38; R. 22, Def.'s Add. at 279; J.A.1, at 316.) The state of Tennessee released Petitioner from custody in September of 1997, and, on his release, Petitioner was required to place himself on the Tennessee Sex Offender Registry or face criminal sanctions. It is undisputed that the Act is being applied retroactively to Petitioner.

In anticipation of his release from custody and concomitant registration under the Act, Petitioner filed a pro se complaint against the Governor of the State of Tennessee in his official capacity seeking relief from the Act on grounds that the Act violated Petitioner's constitutional rights. (R. 1, Compl.) The District Court appointed counsel for Petitioner, and Petitioner then filed an Amended Complaint alleging claims under 42 U.S.C. § 1983 and seeking permanent injunctive relief from the Act. (R. 18, Am. Compl.)

Respondent and Petitioner filed cross-motions for summary judgment, and Petitioner filed a motion for preliminary injunction pending the district court's ruling on the motions for summary judgment. (R. 20, Respondent's Mot. to Dismiss, or in the Alternative, for Summ. J.; R. 28 Petitioner's Mot. for Summ. J.; R. 51, Petitioner's Mot. for Prelim. Inj.) On September 17, 1997, the District Court preliminary enjoined the State of Tennessee from releasing Registry information about Petitioner to the public. (R. 54, Order.) On September 25, 1997, the District Court entered a final order with a memorandum opinion in which the court partially granted and partially denied both motions for summary judgment: the District Court, without specific discussion, held the registration provisions of the Act to be constitutional; however, the District Court held that the public notification provisions of the Act violated the due process rights of Petitioner. (R. 57, Final Order.)

On September 30, 1997, pursuant to 28 U.S.C. § 1291, Respondent appealed to the Sixth Circuit the District Court's holding that the public notification provisions of the Act violated Petitioner's due process rights. (R. 58, Respondent's Notice of Appeal.) On October 20, 1997, Petitioner filed a cross-appeal, asking the Sixth Circuit to review the District Court's holding that the registration provisions of the Act were constitutional and that the public notification provisions of the Act could be constitutionally applied to Petitioner if a due process hearing were conducted before public release of Registry information. (R. 67, Petitioner's Notice of Appeal.) Petitioner specifically asked the Sixth Circuit to invalidate the Act in its entirety on grounds that, among others, (a) the Act was intended as a punitive measure in violation of the Ex Post Facto and Double Jeopardy Clauses of the Constitution and (b) the Act violates Petitioner's due process rights. In the alternative, Petitioner asked the Sixth Circuit to uphold the District Court's ruling that a due process hearing must be conducted before release of Registry information about Petitioner to the public.

Following oral argument, the Sixth Circuit issued its opinion in this matter on October 4, 1999. A majority of the Sixth Circuit panel upheld the District Court's ruling on the registration provisions of the Act and reversed the District Court's ruling that the public notification provisions of the Act were unconstitutional. The majority found that the Act was not punitive in its intent or effects and that the Act did not infringe on a protected interest of Petitioner. Accordingly, the Sixth Circuit upheld the Act in its entirety. Circuit Judge Jones dissented, stating that a due process hearing should be held before the release of Registry information to the public. Judge Jones further stated that the case should have been remanded to the District Court for supplemental constitutional findings because the District Court had limited its discussion to the due process issue.

REASONS FOR GRANTING THE WRIT

An essential premise of our constitutional system is that persons should be given fair warning of the punishments they may suffer for their acts. *See Weaver v. Graham*, 450 U.S. 24, 30-31, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981). The Ex Post Facto clause of the U.S. Constitution thus proscribes the imposition of punishment after the commission of an act. *See* U.S. Const., art. I, § 10. "To fall within the ex post facto prohibition, two critical elements must be present: first, 'the law must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.' " *Miller v. Florida*, 482 U.S. 423, 430, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (citation omitted). The imposition of additional punishment after a conviction likewise violates the Ex Post Facto clause. *See Weaver*, 450 U.S. at 28. Similarly, a law violates the Double Jeopardy clause of the U.S. Constitution if it imposes a second punishment for a previously-punished offense. *See, e.g., Hudson v. United States*, 522 U.S. 93, 98-99,118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

In order to determine whether a law violates the Ex Post Facto or Double Jeopardy Clause, a court must first determine whether the law was intended as punishment and then, if no punitive intent is found, whether the law effectively imposes punishment. *See Hudson v. United States*, 522 U.S. 93, 99, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 2811-12, 125 L. Ed. 2d 488 (1993); *De Veau v. Braisted*, 363 U.S. 144, 160, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960). A law is punitive if it is intended to serve, or effectively serves, retributive or deterrence goals.[3]

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3. Legislation may not avoid the punishment label simply by claiming a preventative rather than retributive goal. "Punishment (Cont'd)

See, e.g., Kansas v. Hendricks, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (retribution and deterrence are the "two primary objectives of criminal punishment"). "Retribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979); *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring) ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.").

The majority of the Sixth Circuit panel disregarded the legislative history behind the Act, as well as Supreme Court precedent for determining legislative intent, when it decided that the Act was not intended as a punitive measure. This case presents a proper forum for the Supreme Court to declare the role of legislative history in the determination of punitive intent. The legislative history involved in this case evinces a strong punitive intent that was not retracted or contradicted

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(Cont'd)
serves several purposes: retributive, rehabilitative, deterrent — and preventative." *United States v. Brown*, 381 U.S. 437, 458-59, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

> In determining whether punitive or nonpunitive objectives underlie a law, *United States v. Brown* established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct. This view is consistent with the traditional purposes of criminal punishment, which also include a preventive aspect.

Nixon v. Administrator of General Svcs., 433 U.S. 425, 480, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). Consistent with this rule, in 1967, this Court found that a law designed to prevent future offenses by sexual offenders to be punitive primarily because of a prevention goal, regardless of any retributive intent. *See Specht v. Patterson*, 386 U.S. 605, 329-30, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

by any expression of purpose in the text of the Act.[4] Petitioner submits that this legislative history is the best evidence of legislative intent, absent an express purpose in the text of the Act, and that such history provides a much better guide for determining intent than judicial analysis of the text and structure of an act or judicial speculation and supposition on what might be the proper or practical goals served by an act.

Another essential premise of our constitutional system is that persons should not be deprived of their protected interests without due process of law. U.S. Const., amend. XIV; *see, e.g., Ingraham v. Wright*, 430 U.S. 651, 674, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). There is no dispute that the Act as presently written does not provide Petitioner with notice and an opportunity to be heard with regard to placement on the Registry and release of Registry information to the public. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971) (notice and opportunity to be heard essential elements of due process); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). However, whereas Petitioner asserted and the District Court found that the Act implicated a protected interest, Respondent asserted and the majority of the Sixth Circuit panel found that the Act did not implicate a protected interest. The Supreme Court should grant this

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4. The Sixth Circuit, in its analysis of the intent behind the Act, properly disregarded an amendment to the Act in 1997 that added an express statement of purpose. *See* App. A at 14a-16a, 20a; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) (intent of legislature that enacted the statute in question controls); *accord Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 758, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979); *United States v. Wise*, 370 U.S. 405, 411, 414, 82 S. Ct. 1354, 8 L. Ed. 2d 590 (1962).

Petition in order to decide this important question of federal law concerning the scope of Petitioner's protected interests and whether such interests are implicated by the Tennessee Act and similar other laws that impose significant registration and monitoring requirements on offenders who have completed their criminal sentences.

I.

The legislative history, structure, and text of the Act reveal a punitive intent.

As detailed in the Statement of the Case above, the sponsors of the Act clearly and repeatedly stated that the Act was intended to deter future crimes by sexual offenders and was intended to deter sexual offenders from residing in or even traveling to Tennessee. (R. 22, Def.'s Add. at 30, 32, 35, 42, 49, 55, 57; J.A.1, at 78, 80, 83, 90, 97, 103, 105.) Those offenders stubborn enough to remain were warned that they would no longer be allowed to live an anonymous "cloak and dagger" lifestyle and that their acts would not go "unpunished." (R. 22, Def.'s Add. at 32; J.A.1, at 80.) The requirements and conditions of the Act were intended to be so burdensome, unpleasant, stigmatizing, and embarrassing — so punishing — that offenders would seek to avoid Tennessee or leave Tennessee if already here.

The Sixth Circuit improperly ignored this substantial evidence of punitive intent. *See* App. A at 14a-20a (no discussion of legislative history). The statements by the Act's sponsors in particular were "an authoritative guide to the statute's construction," *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982), that deserved "to be accorded substantial weight," *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564, 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1976) (citations omitted). *See also, e.g., H.J. Inc. v. Northwestern Bell Tele., Co.*, 492

U.S. 229, 246-47, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (citing statements by sponsor of the RICO Act as evidence of congressional intent); *Orloff v. Willoughby*, 345 U.S. 83, 98, 73 S. Ct. 534, 97 L. Ed. 842 (1953) (Frankfurter, J., dissenting) ("Whatever we may think about the loose use of legislative history, it has never been questioned that reports of committees and utterances of those in charge of legislation constitute authoritative exposition of the meaning of legislation.").

Consideration of the legislative history is proper and important. In the case of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), for instance, the Supreme Court found the legislative history of an act, including congressional pronouncements and debate, to indicate conclusively a punitive purpose behind an act. *See id.* at 169-84; *see also, e.g., Artway v. Attorney General*, 81 F.3d 1235, 1264 (3d Cir. 1996) (examining legislative history to determine "actual purpose" behind New Jersey's version of Megan's law). As the majority in the Sixth Circuit noted, the Supreme Court's decision in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), directed courts to examine whether legislatures expressly or impliedly revealed a punitive or regulatory intent. *Id.* at 99. In this case, both sponsors of the Act, among others, expressly pronounced that the Act was to serve a deterrence purpose, and the legislative history contains no evidence disavowing this punitive intent. Where the text of an act is silent as to its intent, then pronouncements of legislators should be at least as good an indicator of legislative intent as that resulting from judicial construal of the text and structure of the act — particularly in a case such as this, where the Act's sponsors explicitly stated the Act's purpose.

Justice Stevens has explained why it is reasonable and necessary to rely on the statements of a bill's sponsors and

reports from congressional committees when determining congressional intent:

> Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.

Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 116 S. Ct. 637, 643, 133 L. Ed. 2d 635 (1996) (Stevens, J., concurring). In this case, the clear statements of the Act's sponsors and other legislators should have been given substantial weight and should have acted as authoritative guides to the conclusion that the Tennessee legislature intended the Tennessee Sexual Offender Registration and Monitoring Act to serve punitive purposes.

The majority of the panel likewise ignored the substantial evidence of punitive intent found in the text of the Act and in other provisions of the Tennessee Code to arrive at the conclusion that it could "find no indication that the Tennessee legislature intended the Act to be a punitive measure." App. A at 15a. A fair reading of the text and structure of the Act would have bolstered the conclusion from the legislative history that the Act was meant to serve punitive purposes.

First, the legislature's classification of the Act as a part of the criminal code (Title 40 on criminal procedure)

strongly supports the conclusion that the Act was intended as part of Tennessee's criminal justice scheme. *See Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (placement of statute within civil or criminal code significant to determining legislative intent). Second, the use of the rehabilitation requirement for removal from the Registry is intended to serve a goal typically associated with the penal system. Third, the requirement that the TBI constantly remind offenders of their obligations under the Act, and of the criminal sanctions for violation of the Act (including revocation of parole and reapprehension), *see* Tenn. Code Ann. § 40-39-105(e) (1997), strongly supports the conclusion that deterrence was a central goal behind the Act: the legislature wanted sexual offenders continually reminded that they are under the constant supervision of the TBI and that they are constantly under the threat of sanctions if they should fail to comply with the Act in any way. Finally, the legislature's classification of lifelong community supervision as a form of punishment under another statute (Tenn. Code Ann. § 39-13-524; App. E at 69a-70a) further bolsters the clear conclusion that registration and monitoring under the Act is a punitive measure.[5]

As indicated by the repeated statements of the Act's sponsors, the text of the Act, its placement in the criminal code, and the similarity between its provisions and those in other statutes acknowledged to be punishment, and by the noticeable absence of any statements to the contrary within the legislative history, the punitive goal of deterrence was central to the Act's introduction and passage and was not merely incidental to any desired regulatory effects.

5. In Tenn. Code Ann. § 39-13-524, the legislature specifically acknowledged that lifelong community supervision was a punishment "in addition to the punishment authorized by the specific statute prohibiting" the targeted conduct. Tenn. Code Ann. § 39-13-524; App. E at 69a-70a.

See Bateson v. U.S. ex rel. Bd. of Trustees, 434 U.S. 586, 591, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1977) (relying on "authoritative Committee Reports" to determine congressional intent behind the Miller Act and noting significantly that "[t]here is nothing to the contrary [to that intent found in the reports] anywhere in the legislative history"). The legislature repeatedly expressed an intent that the Act serve the punitive goals of deterrence, retribution through shaming, and even rehabilitation through its requirement of a finding of rehabilitation as a precondition to removal from the Registry, and this expression of intent should have been determinative in the intent-effects analysis conducted by the Sixth Circuit.

II.

The Act infringes on Petitioner's protected interests without due process.

The District Court held that the Act implicated state and federal privacy rights and the right to seek employment of one's own choosing. (R. 56, Mem. of Ct. at 6-8; J.A.2, at 567-69.) The District Court also held that the stigma and injury to one's reputation that would result from disclosure of Registry information and the concomitant loss of privacy and employment rights satisfied the "stigma plus" test established in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) and *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971), for determining when due process protections are triggered. (R. 56, at 8-9; J.A.2, 569-70.) Because protected interests were implicated but not protected, the District Court held that the public notification provisions of the Act "violate the due process rights of plaintiff." (R. 57, Final Order; J.A.2, at 578.) To remedy this flaw, the District Court stated that the Plaintiff should be given an opportunity to be heard before public disclosure of Registry information and should be

allowed to present evidence why such disclosure was not necessary to protect the public, and that the state should bear the burden of persuasion at the hearing. (R. 56, Mem. of Ct. at 9; J.A.2, at 570; App. B at 54a-56a.) In the District Court's opinion, "[d]issemination of information from the sexual offender registry without the control of anyone other than local law enforcement and without an opportunity for hearing offends basic concepts of fairness." (R. 56, at 10; J.A.2, at 571 App. B at 55a-56a.)

The majority of the Sixth Circuit disagreed with the District Court and held that the Act did not infringe on any protected interest of Petitioner. Petitioner submits that the Sixth Circuit erred and that this Court should find that the Act does jeopardize protected interests of Petitioner that are entitled to the protections of the Due Process Clause.

First, and most fundamentally, if the Court finds that the Act was intended as a punishment, then the Act intrudes on Petitioner's liberty interest. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977).

Second, the Court should find that Petitioner has an interest in being free from the public stigma and constant supervision that the Act imposes on his personal privacy, liberty, and ability to seek and retain employment. *See Paul v. Davis*, 424 U.S. 693, 708-09, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971). The Act is intended to end registrants' "anonymity" and ultimately drive them from the community. (R. 22, Def.'s Add. at 32; J.A.1, at 80.) The state legislature specifically contemplated that, through the Act, employers would be notified that they are employing convicted sexual offenders (R. 22, at 57; J.A.1, at 105), and the public at large will also be told this fact, reasonably causing employers to fear retaliation for employing such individuals. The Act imposes a stigma on registrants that

was not otherwise present simply because of their crime and conviction, both through the Act's imposition of lifetime supervision by the police for supposedly repetitive and compulsive behavior and through its notification provisions, by which the police may inform the public that (in the police's opinion) a dangerous offender is in their midst who is to be watched and avoided at all times. Being convicted of a crime, particularly a serious crime, may well be stigmatizing in and of itself. However, other criminals, even those convicted of crimes more serious than those included in the Registry, once they have completed their sentences, are not constantly under the threat of community ridicule and scorn by actions of the police without notice or recourse, are not branded worthy of continual, lifelong police supervision, are not required to inform the police of their every movement for the rest of their lives (subject to possible immediate apprehension even for accidental violations of the Act), and are not generally made to prostrate themselves before law enforcement officials for the rest of their lives. Such other criminals are, in a very real sense, free once they are released from custody and supervision; under the Act, however, sexual offenders — regardless of the type and seriousness of offense — are never free from supervision, suspicion, scorn, and even, in a sense, officially-sanctioned harassment.

Once the public is put on notice of the supposedly dangerous individual and his whereabouts, the damage is done. "Notification puts the registrant's livelihood, domestic tranquility, and personal relationship with all around him in grave jeopardy." *E.B. v. Verniero*, 119 F.3d 1077, 1107 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 1039 (1998); *see also Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998) ("The released sex offender living in a small community might well become a pariah. . . ."). That is why the New Jersey Supreme Court in *Doe v. Poritz*, 662 A.2d 367, 421 (N.J. 1996), and the District Court below properly concluded that the stigma, possibility

of harm, and damage to one's reputation and livelihood from disclosure under the Act pose a sufficient threat of intrusion on protected interests that a due process hearing must occur before public notification may occur, so that the accuracy of the disclosure and the need for it can be filtered through a judicial check while also giving the registrant a chance to object and respond. *Cf. Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (city's disclosure of home addresses of police officers to persons likely to seek revenge implicated a constitutionally protected liberty interest).

Furthermore, the Act's alteration of registrants' legal status, when combined with the stigma concomitant to placement on the Registry and/or public release of Registry information, should trigger the protections of the "stigma plus" test of *Paul v. Davis*, 424 U.S. 693, 708-09, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). *See Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998) ("In light of these requirements placed on registrants, there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act for a minimum of ten years and, for some, permanently. These requirements obviously encroach on the liberty of convicted sex offenders, and therefore, they suffer a tangible impairment of a right in addition to mere harm to reputation."). By altering the legal status of previously-convicted sex offenders from the status they would have otherwise had simply as released offenders who have completed their sentences — by subjecting this class of offenders to added reporting requirements and new criminal liability not threatened against other classes of offenders, by the constant monitoring of offenders' whereabouts, employment, aliases, and appearance; and by the threat of unknown publication of Registry information by law enforcement at any time to anyone — without due process of law, the Act runs afoul of the Fourteenth Amendment.

Third, Petitioner has a right to pursue gainful employment that is affected by the Act. *See Board of Regents v. Roth*, 408 U.S. 564, 573-74, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Lange-Kessler v. Department of Education of the State of New York*, 109 F.3d 137, 140 (2d Cir. 1997). As discussed immediately above, the release of information to employers, as contemplated by the legislature (R. 22, Def.'s Add. at 57; J.A.1, at 105) and as allowed by the text of the Act, will greatly interfere with Petitioner's right to seek and gain employment. As the District Court stated, "[t]here is no question that prospective employers would not want to hire someone they thought posed a danger to society, thereby effectively foreclosing employment opportunities . . ." (R. 56, Mem. of Ct. at 8; J.A.2, at 569.) If the Act is not intended to and will not affect an offender's employment (either by casting him in an unfavorable light to employers and customers or making him susceptible to added monitoring and even reproach at his job), then why is employment information contained in the Registry *and* made subject to public disclosure?

Fourth, Petitioner should have a federally-protected privacy interest in the nondisclosure of personal matters and information gathered by the state that was not public information prior to the Act and in being free from state intrusions into his privacy. *See U.S. Dep't of Justice v. Reporter's Comm'n for Freedom of the Press*, 489 U.S. 749, 767, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989); *see also Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (finding a privacy interest in the nondisclosure of one's home address but finding state's interest in disclosing the address to be compelling). Here important non-public and personal information is affirmatively disclosed by the police; information is not simply made available to interested citizens who pursue a valid request for information. But for the disclosure of Registry information, the community would have no statutory right to find out an offender's home or

work address after the offender's release or to current photographs, name and alias information, nor driver's license or Social Security number information if the offender had been paroled. *See Abernathy v. Whitley*, 838 S.W.2d 211, 214 (Tenn. Ct. App. 1992) (noting that there is "no generally recognized state or federal constitutional right of access to public records); *see also Whalen v. Roe*, 429 U.S. 589, 598-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Also but for the Act, the public would have to initiate and pursue any requests for information (presumably based on some specific reason or fear) subject to the protections provided by the state administrative rules and regulations. With passage of the Act, Petitioner's personal information may now be disseminated widely within a community by the police acting in their sole and unchecked discretion to determine who should be given registrant information.[6] Through such dissemination, the Act does away with Petitioner's "right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting), and his right to be free of unwarranted state intrusions into his privacy, *U.S. Dep't of Justice v. Reporter's Comm'n for Freedom of the Press*, 489 U.S. 749, 767, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989).

Importantly, the Sixth Circuit's majority opinion in this case conflicts with a prior decision of the Sixth Circuit in which the court held that disclosure of personal and family information of police officers "encroached on [the officers']

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6. Petitioner's state privacy interests are likely broader than those guaranteed by the federal constitution and should be given even greater protection. *See Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996). As acknowledged by the majority of the panel in the Sixth Circuit, the Tennessee Supreme Court has not addressed the question of whether the Act infringes on state privacy rights. Nevertheless, the Sixth Circuit speculated that the state supreme court would not find a protected interest implicated by the Act, rather than having certified the question to the state court as Petitioner had requested.

fundamental rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment." *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (city's disclosure of home addresses of police officers to persons likely to seek revenge implicated a constitutionally protected liberty interest). Thus, the Sixth Circuit has already established that persons have a protected interest in personal information, where the disclosure of such information may cause intrusions on personal security. Given the undisputed record of numerous acts of physical harm directed at registrants and their families, there can be no serious dispute that disclosure of personal registrant information subjects registrants to intrusions into their personal security that should give rise to due process protection. *See Doe v. Pataki*, 940 F. Supp. 603, 608-11 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997) (detailing numerous incidents of vigilantism, at times on persons of mistaken identity, after the public was notified of offenders in their localities); *see also* James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 Yale L.J. 1055, 1088 n.151 and accompanying text (1998).

Finally, as shown by statements in the legislative history, the Act was intended to interfere with Petitioner's constitutional right to travel freely between the states. *See* U.S. Const., art. IV, § 2; *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986).

In sum, application of the Act to Petitioner significantly intrudes on important interests of Petitioner, and Petitioner requests that the Court grant this Petition to consider whether these interests should be protected interests under the Due Process Clause. Federal law requires an opportunity to be heard when, for example, an automobile is seized by the government, *e.g.*, *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356-57 (5th Cir. 1972); *Jaekel*

v. United States, 304 F. Supp. 993, 998-99 (S.D.N.Y. 1969), yet in this case the State of Tennessee imposes lifelong registration and monitoring burdens on previously-punished offenders and allows law enforcement officials wide discretion to publicize stigmatizing information about these persons without so much as a parole officer's opinion that the person poses any future threat or a letter to the registrant giving notice of the release of information. Surely a person's family, friend, and business relations, and his personal and familial safety, as well as even his reputation, are deserving of at least as much protection as a 1961 Chevrolet Impala receives. *See One 1961 Red Chevrolet Impala Sedan*, 457 F.2d at 1356-57; *see generally United States v. Good Real Property*, 510 U.S. 43, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993) (due process clause requires pre-seizure notice and meaningful opportunity to be heard except in extraordinary circumstances).

CONCLUSION

As of the present date, all fifty states have adopted some form of sex offender registration and monitoring act, the great majority of which apply retroactively and involve public release of registry information. *See* Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, App. 1 (1998). The Tennessee Act and similar other acts raise foundational issues of federal law regarding the manner in which the regulation of undesirable conduct may be balanced against the punishment of past offenses and about the types of personal interests and rights that government may infringe without providing even minimal due process protections. For the reasons stated above, Petitioner requests that this Petition be granted so that these important issues of federal law may be considered.

Respectfully submitted,

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